No. 2481

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MARY L. GIBBONS, *Petitioner,* *vs.* J. S. GOLDSMITH, as Trustee in Bankruptcy of the Estate of PAT GIBBONS, Bankrupt, *Respondent.*	No. 2481

IN THE MATTER OF PAT GIBBONS, BANKRUPT.

SEPARATE BRIEF OF THE DEXTER HORTON TRUST & SAVINGS BANK, A CREDITOR.

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Solicitors for
Dexter Horton Trust & Savings Bank.
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PRELIMINARY STATEMENT.

Upon the authority of *In re. Lane Lumber Co., Hirlinger vs. Boyd,* 217 Fed. 546, decided by this court on August 17, 1914, we deem it our duty to suggest that appeal is the exclusive remedy and that your honors have no authority to review the judgment in this proceeding.

Respectfully submitted,

CLISE & POE,

Solicitors for

Dexter Horton Trust & Savings Bank.

STATEMENT UPON THE MERITS.

While presenting various aspects the broad question to be determined is whether the District Court erred in holding that under the community property laws of the State of Washington the bankruptcy of a married man vests the trustee in bankruptcy with title to community property to the extent that the same may be sold and the proceeds devoted to the payment of community debts. The courts of Washington having uniformly held that all property standing in the name of either spouse is presumed to belong to the community and that all debts contracted during coverture are *prima facie* community obligations.

Counsel has wandered somewhat afield in his statement and argument and we feel that a clear understanding of the issues requires a brief restatement of the facts as they appear from the record before you.

Pat Gibbons was adjudged bankrupt by the District Court of the United States for the Western District of Washington, Northern Division. At the time of the adjudication, and for nearly thirty years prior thereto, he and appellant were man and wife and residents of King County, Washington. As such they composed a community under the laws of

the state, but Mrs. Gibbons was not joined as a party defendant in the bankruptcy proceedings.

Numerous claims aggregating more than $100,000 were filed and allowed. The largest of these was the claim of the Dexter Horton Trust & Savings Bank, which had been duly reduced to judgment in the local courts some time prior to the adjudication.

The assets scheduled consisted of several items, but were unsubstantial, with the exception of the coal mine described by counsel, which was subject to the lease referred to by him, and certain rents or royalties payable thereunder amounting to $8,174.51. These rents or royalties had been paid by the lessee to the Seattle National Bank for the benefit of the trustee, because the latter had contemplated resisting the validity of the lease and did not care to jeopardize his rights by permitting the lessee to attorn to him.

On June 19, 1914, all of the assets were offered for sale and purchased by the Dexter Horton Trust & Savings Bank, which paid $48,050 spot cash therefor. This sale was duly confirmed and we do not understand that its regularity is questioned. In any event no appeal was taken therefrom or any objection interposed.

When the sale had been completed and the purchase price paid the bankrupt's estate had been "reduced to money" and was in a condition to be closed. It then became necessary for the trustee to withdraw the royalties of $8,174.51 from the Seattle National Bank in order that they might be distributed with the rest of the estate. When he attempted to do so, however, the bank declined to pay, basing its refusal upon the fact that appellant had asserted some adverse claim to the fund.

Thereupon the trustee filed his petition in the District Court praying for an order directing the bank to show cause why it should not pay the money and requiring appellant to appear at the same time and propound any claim which she might have to the royalties and also to the purchase price paid by the trust company (R. p. 7).

An order to show cause was issued upon the petition and duly served upon the bank and Mrs. Gibbons. The latter in response appeared specially, objected to the jurisdiction and moved to quash the citation or order to show cause (R. p. 15). These motions were both overruled, whereupon she answered, but still insisted upon her special appearance.

Among other things her answer contained an affirmative defense alleging in effect: (a) That all

their property belonged to the community; (b) that substantially the entire indebtedness was the separate indebtedness of her husband and not of the community; (d) that the claim of the Dexter Horton Trust & Savings Bank was likewise the separate indebtedness of Mr. Gibbons, save that thirty thousand thereof was not even owed by him at all, but was the separate indebtedness of N. H. Latimer and C. E. Burnside. The length to which appellant seems willing to go and the absurdity of the propositions to which she seems willing to subscribe, are well illustrated by this last allegation as the claim of the trust company had been reduced to judgment in an adversary proceeding before a court of competent jurisdiction several years before, and the judgment there entered is clearly *res adjudicata.*

A general denial was filed by the trustee by way of reply to this answer, which put in issue all its affirmative allegations, including the character of the claims filed. Appellant offered no proof and the Honorable John P. Hoyt, then referee in bankruptcy, upon the issues as framed entered an order adjudging all the assets to be the property of the community composed of Mr. and Mrs. Gibbons; that some if not all the claims proved were actually community debts; that the rest were presumptively so;

and that the trustee was entitled to the sole possession of the community property and of the funds derived therefrom.

This order was supported by a written opinion, which we print below, because Judge Hoyt as a member of the State Supreme Court and as referee in bankruptcy since the creation of that court in this district, has had an unrivaled opportunity to observe, and by his decisions aid in the development of our community law since Washington became a State.

> "From the facts disclosed by the pleading herein, the funds as to which the controversy relates are all the proceeds of property belonging to the community composed of the bankrupt and his wife, Mary L. Gibbons, and the question as to the right to the proceeds is being waged between the trustee and the said wife. It follows that if the trustee has the right in this proceedings to take possession of the community property, that as between such trustee and said Mary L. Gibbons, he, the said trustee, is entitled to the possession of the funds in question, and such possession cannot be interfered with in the interests of the wife. This being so, but one question is presented for the decision of the Referee, and that is, as to whether or not the bankruptcy proceeding against the husband alone brings into the possession of the court the estate of the community composed of the bankrupt and his wife. This question, so far as the Referee is advised, has never been decided squarely in a contested matter by the Federal

Courts in this district. The practice, however, has been for the trustee in a bankruptcy proceeding instituted by or against the husband alone to take possession of the community property and administer it in the proceeding, ever since the enactment of the present Bankruptcy Law, and while this practice would not necessarily determine the law, it should have much weight in determining the question presented if it was a doubtful one, and this custom so long followed would make it the duty of a Referee in Bankruptcy to adhere thereto, unless clearly satisfied that it was unwarranted under the statute.

"The Referee before whom this question is pending is not only not satisfied that this custom has proceeded upon an erroneous view of the statute, but he is of the opinion that no other construction of the statute could be possible under the decision of the Supreme Court of this State. So far as he is advised, it has always been held by such court that a judgment against the husband was *prima facie* a judgment against the community and could be enforced against community property, and if such would be the force of a judgment against the husband alone, it seems clear that a proceeding in bankruptcy against him alone would authorize the taking into the possession of the court of all the community property. Said court in Ninth Washington expressly held that a proceeding in insolvency by the husband alone brought into the possession of the court the community estate, and so far as the Referee is advised, this decision has never been in any way overruled or modified, and if such was the effect of a proceeding against the husband alone under the State Insolvency Statute, there seems to be no

good reason why such is not the effect of a proceeding by or against him under the Bankruptcy Act. The question is not now presented as to the distribution of the funds derived from the community estate in the possession of the trustee. In such distribution it may be necessary for the court to determine the *status* of the claims filed and allowed in the proceeding as claims against the community, or against the separate estate of the husband. As stated before, this question is not now before the Referee, and he being of the opinion that the trustee in the proceeding is entitled to all the community estate, or the funds derived therefrom, must decide that as between the trustee and the wife of the bankrupt, the trustee is entitled to the sole possession of all community property, or the funds derived therefrom.

"An order may be prepared and submitted adjudging the trustee entitled to the possession and control of all the funds in question.

"Dated at Seattle, in said District, this 21st day of July, 1914.

"Referee in Bankruptcy."

Upon the entry of the order last referred to, appellant obtained a review by the District Court, Judge Neterer presiding, who affirmed the Referee, directed him to proceed with the administration of the estate, and filed a written opinion which appears at page 26 of the record.

From this order appellant comes here. Her grievances as we understand them are covered by

paragraphs twelve and thirteen of her petition for review and are that the court had no jurisdiction or authority to : (1) order the sale which is therefore invalid; (2) direct the Seattle National Bank to pay the royalties of $8,174.51 to the trustee; (3) direct the trustee to proceed with the administration of the estate and distribution of these royalties and the purchase price of $48,050; (4) direct appellant to propound her claims, as her rights could only be adjudicated by a plenary suit in the Superior Court of the State of Washington for King County.

ARGUMENT.

Objections two, three and four can be answered by merely calling attention to the fact that the sums in dispute are not only constructively but actually in the custody of the bankruptcy court—the purchase price, through the possession of its right arm, the trustee—the royalties, because the payment by the lessee to the Seattle National Bank, for the account of the trustee, was in effect and in fact a payment to him, as the bank immediately became his agent.

Mueller vs. Nugent, 184 U. S. 1, (46 L. Ed. 405.)

That physical possession of a thing by a court

vests it with exclusive jurisdiction over the same for all purposes, needs no argument.

From this elementary common sense principle it follows that the bankruptcy court having possession of the *res,* inherently and independently of statute, acquired exclusive jurisdiction to determine all conflicting claims relating thereto and the sole right of disposition thereof.

The proposition has been announced by various courts with almost tiresome repetition and we could multiply the authorities indefinitely. This is unnecessary, however, as the Supreme Court of the United States has spoken upon the subject at least as late as January, 1909. It was there said:

> "Where a court of competent jurisdiction has taken property into its possession, *through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The court, having possession of the property, has an ancillary jurisdiction to hear and determine all questions respecting the title, possession, or control of the property.* In the courts of the United States this ancillary jurisdiction may be exercised, though it is not authorized by any statute. The jurisdiction in such cases arises out of the possession of the property, and is exclusive of the jurisdiction of all other courts, although otherwise the controversy would be cognizable in them. *Wabash R. Co. vs. Adelbert College,* 208 U. S. 38, 54, 52 L. ed. 379, 386, 28 Sup. Ct. Rep. 182. Accordingly, where pro-

perty was in the possession of the bankrupt at the time of the appointment of a receiver it was held that the bankruptcy court had jurisdiction to determine the title to it as against an adverse claimant, and that the receiver had not right to deliver it to him without the order of the court. *Witney vs. Wenman,* 198 U. S. 539, 49 L. ed. 1157,, 25 Sup. Ct. Rep. 778. On the day the opinion in the Bardes Case was announced the same justice delivered the opinion of the court in *White vs. Schloerb,* 178 U. S. 542, 44 L. ed. 1183, 20 Sup. Ct. Rep. 1007, a case in which the facts were essentially those of the case at bar. Certain persons, co-partners in trade, were adjudicated bankrupts and the case was sent to a referee in bankruptcy. They had a stock of goods in a store, the entrance to which was locked by the referee. Certain other persons claimed title to part of the stock of goods as obtained from them by a fraudulent purchase, which had been rescinded. After the adjudication, these persons brought an action of replevin of the goods against the bankrupt in a state court, which was executed. It was held that replevin would not lie in the state court, and that the district court had jurisdiction by summary proceedings to compel the return of the property seized. The court said: 'The goods were then in the lawful possession of and custody of the referee in bankruptcy, and of the bankruptcy court, whose representative and substitute he was. Being thus in the custody of a court of the United States, they could not be taken out of that custody upon any process from a state court.' *The last two cases cited proceed upon and establish the principle that when the court of bankruptcy, through the act of its officers, such as referees, receivers, or trustees, has taken possession of a res, as the property of*

a bankrupt, it has ancillary jurisdiction to hear and determine the adverse claims of strangers to it, and that its possession cannot be disturbed by the process of another court. And see Skilton vs. Codington, 185 N. Y. 80, 85, 86, 113 Am. St. Rep. 885, 77 N. E. 790, and Frank vs. Vollkommer, which, by implication approve the same principle.

Murphy vs. John Hofman Co., 211 U. S. 562-567 (53 L. ed. 327-330.)

This leaves only the primary question i. e. the title of the trustee in the community property and the right of the court to order the sale in the first instance. A determination of this point depends upon whether or not the adjudication vested the trustee with title to the community property and with authority to devote the same to the payment of community debts. It must be remembered that we are not contending that community real estate can be devoted to the discharge of the separate obligations of either spouse.

It was admitted in argument and found as a fact by Judge Hoyt and Judge Neterer that a portion of the indebtedness was actually community. (See opinion of Judge Neterer R. p. 26.) On the other hand appellant's answer states that the Dexter Horton Trust and Savings Bank's claim is a separate debt, while the reply avers that it is a com-

munity obligation. No proof was offered and in its absence this court must accept the reply as true, as all debts contracted during coverture are *prima facie* community obligations. For this reason your Honors must approach this case as if all the claims were actually, in contradistinction to presumptively, proved community debts.

This presumption is always entertained and can only be overcome by clear, cogent and convincing testimony.

> "But it is claimed that in the absence of any showing of this kind it will be presumed that it was the separate debt of the spouse against whom the judgment was rendered. In our opinion, every debt created by the husband during the existence of the marriage is *prima facie* a community debt. All the property acquired by him is *prima facie* community property, and we think that justice and good conscience demand that the other presumption should also prevail. In the absence of any proof as to the nature of the debt this presumption obtained, and, for the purpose of this case, the debt upon which this judgment was rendered must be held to have been a community debt, and for that reason the entire property of the community divested by the sale made thereuponder; and, as this appellant is charged with full notice, it can assert no right which the community could not have asserted if it had not conveyed. It follows that it has no interest whatever in the property."
>
> *Calhoun vs. Leary,* 6 Wash. 21.

Diamond vs. Turner, 11 Wash. 189.

Peacock vs. Ratliff, 62 Wash. 653. (114 Pac. 507.)

Bird vs. Steele, 74 Wash. 68. (132 Pac. 724.)

In *Bird vs. Steele, supra,* it was said:

" * * * This court has held in a long line of cases, indeed, as is said in *Floding vs. Denholm,* 40 Wash. 463, 82 Pac. 738, that a debt contracted by the husband in the prosecution of the community business rendered the community property liable for the debt, is no longer an open question in this state. This principle has been applied to simple contract debts. *Oregon Imp. Co. vs. Sagmeister,* 4 Wash. 710, 30 Pac. 1058, 19 L. R. A. 233; *Horton vs. Donohoe-Kelly Banking Co.,* 15 Wash. 399, 46 Pac. 409, 47 Pac. 435; *McKee vs. Whitworth,* 15 Wash. 536, 46 Pac. 1045; *Philips & Co. vs. Langlow,* 55 Wash. 385, 104 Pac. 610. To an accommodation indorser: *Shuey vs. Holmes,* 22 Wash. 193, 60 Pac. 402. To one liable for a superadded liability as a subscriber to the stock of a corporation: *Shuey vs. Adair,* 24 Wash. 378, 64 Pac. 536. To obligations incurred as a surety for a corporation in which the husband is a stockholder and the stock belonged to the community: *Allen vs. Chambers,* 18 Wash. 341, 51 Pac. 478; *Allen vs. Chambers,* 22 Wash. 304, 60 Pac. 1128. In an action for fraud and deceit: *McGregor vs. Johnson,* 58 Wash. 78, 107 Pac. 1049, 27 L. R. A. (N. S.) 1022. And finally it was held that the community is liable for a tort committed by the husband when engaged in a business conducted for the benefit of the community. *Milne vs. Kane,* 64 Wash. 254, 116 Pac. 659, Ann. Cas.

A. 318, 36 L. R. A. (N. S.) 88; *Woste vs. Rugge,* 68 Wash. 90, 122 Pac. 988."

Bird vs. Steele, 74 Wash. 71.

And this presumption extends to debts contracted without as well as within the state.

La Selle vs. Woolery, 11 Wash. 337.

All property acquired during coverture is likewise presumed community "until the contrary is shown by clear and convincing proof".

Yesler vs. Hochstettler, 4 Wash. 349.

Freeburger vs. Caldwell, 5 Wash. 767.

Curry vs. Catlin, 9 Wash. 495.

Denny vs. Schwabacher, 54 Wash. 689.

Section 5918, *Remington & Ballinger's Code of Washington,* gives the husband—

> " * * * the management and control of the community real property, * * * but he shall not sell, convey or encumber community real estate, unless the wife joins * * *."

This section further provides—

> " * * * that all such community real estate shall be subject * * * to liens of judgments recovered for community debts, and to sale on execution issued thereon."

That the debts of either spouse contracted dur-

ing coverture are presumptively community and that community property may be levied upon and sold under a judgment obtained against the husband is placed by the decisions quoted and numerous others beyond cavil.

Curry vs. Catlin, 9 Wash. 495. (37 Pac. 678.)

Diamond vs. Turner, 11 Wash. 189. (39 Pac. 379.)

And a conveyance to an assignee for the benefit of community creditors is not such a conveyance as comes within the statutory inhibition, but is merely a rightful application of the community property to the discharge of community obligations.

Thygesen vs. Neufelder, 9 Wash. 455.

Section 70 of the Bankruptcy Act automatically vests the trustee upon his appointment and qualification, by operation of law with title to:

> "Subdivision (5) property which prior to the filing of the petition he could by any means have transferred or which might have *been levied upon and sold under judicial process against him.*"

The amendment of 1910 to section 47 of the Bankruptcy Act provides:

> " * * * and such trustees, as to all property in the custody or coming into the custody

> of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and *powers of a judgment creditor holding an execution duly returned unsatisfied.*"

The Supreme Court of Washington held in the *Thygesen* case that an assignment by a husband for the benefit of his creditors carried all community property to the assignee for the payment of community debts. The court recognized the statutory requirements that the wife must ordinarily join with the husband in the conveyance of community real property, but nevertheless held that the deed of assignment by the husband alone carried title to the assignee in trust for the payment of community debts.

The court after reaffirming and approving *Oregon Improvement Co. vs. Sagmeister,* 4 Wash. 710 (30 Pac. 1058), holding that a judgment against the husband alone was *prima facie* binding upon the community and one for which the community real property might be sold under execution, approached the question of the husband's right to convey. In this connection it was said at page 459:

> "But it is contended on the part of the

respondent, that to give to the deed of the husband alone any force whatever, is in violation of our statute (Gen. Stat. Sec. 1400), which provides that no conveyance or incumbrance of the community real estate shall be valid unless the husband and wife join in the making thereof. If this deed comes within the inhibition of this statute, it is undoubtedly void. But in our opinion it does not. As above suggested, we think it is not a deed or an incumbrance of the property in the ordinary sense. On the contrary, it is but a surrender of the same into the custody of the court for the purpose of having it applied as the law requires it to be; and if there is any surplus remaining, it would be returned to the community. The paper executed by the husband should therefore be considered not as a conveyance but as one of the methods by which the property may be subjected to the community debts, and that it being in the power of the husband to contract such debts in the prosecution of the business of the community, it is within his power to set on foot the machinery of the law by which its property may be applied to their payment."

Thygesen vs. Neufelder, 9 Wash. 459.

Twenty years after the decision in the *Thygesen* case (whose authority has never been questioned) the same court held in *Bimrose vs. Matthews* (decided February 6, 1914), that a discharge of the husband in bankruptcy from the obligation of a community debt operated to also discharge the wife, although she was not a party to the bankruptcy pro-

ceeding. The court speaking to the question said at page 38:

> "The appellant also argues that the discharge of W. H. Starkey by the United States District Court in bankruptcy did not discharge Alice B. Sharkey, his wife. The property sold by Starkey and wife was community property and the contract was a community contract. Under the statutes of the state, the husband has the management and control of such property, but he shall not sell, convey or encumber the same without his wife joining in the conveyance. *Rem. & Bal. Code,* Sec. 5918 (P. C. 95, Sec. 29). When the husband was discharged in bankruptcy from the obligation of the contract, it must of necessity follow that the wife was also discharged, because her separate property is not subject to the community debt. *Sweet, Dempster & Co. vs. Dillon,* 13 Wash. 521, 43 Pac. 637. Nor the separate debts of her husband. *Rem. & Bal. Code,* Sec. 5916 (P. C. 95, Sec. 9)."

Bimrose vs. Matthews, 78 Wash. 38.

This was a clear recognition of the Bankruptcy Court's right over community property, for how could the wife or the community be released unless the court has authority to devote the community property to the discharge of its debts? It certainly could not discharge the liability without first exhausting the assets.

Counsel base their principal argument upon certain cases which hold that a partnership cannot

be insolvent so long as any of its members are individually solvent. We have no quarrel with this doctrine.

Admitting some common attributes there is really but little anology between the Washington community and an ordinary co-partnership. We all know that the one is a creature of statute whose *status* is fixed, and indeterminable except by death or divorce, while the other is born in contract and subject to termination at the will of the parties.

Without attempting to analyze the points of resemblance and difference, we need only call attention to the fact that it is an every day occurrence for one partner to acquire property and to incur obligation outside the scope of the partnership. On the other hand it is difficult to conceive of a situation wherein a married man could do either without affecting the community. The fruits of his every effort operate to its advantage and it must pay the penalty of any obligation which he incurs in the conduct of its business. His business is its business and the man, his wife, and the community they compose, are so perfectly blended that it is impossible from a business standpoint to distinguish them. Solvent partnerships may have one or more insolvent members but it would take a broad stretch of

the imagination to conceive of an insolvent husband at the head of a solvent community of thirty years standing.

The argument pursued by counsel in his endeavor to establish their identity only tends to emphasize and prove them inherently distinct. We shall therefore follow his argument no farther, but discuss what we believe to be the fundamental point of jurisdiction. We shall further ignore that portion of his argument which is based upon facts dehors the record.

It is probable that the framers of the Bankruptcy Act never heard of our community law, and highly improbable that they had it in mind when the act was drafted. It is incumbent upon the courts however to administer the Act in this jurisdiction, and to do so intelligently it must be adapted to the local situation.

All judgments rendered against either spouse during coverture are presumed to be community obligations, and community property may be sold on execution in satisfaction thereof without further ado. This presumption has been universally applied and has become a settled rule of property within the jurisdiction.

It is well settled that the allowance or disallow-

ance of a claim by a Bankruptcy Court is *res judicata* in a proceeding on the claim in another jurisdiction.

Hangadine vs. Hudson, 122 Fed. 238. (See C. A. 8 Circuit.)

Elmore vs. Henderson, 60 So. 820 (Ala.).

It was determined by the Supreme Court of Washington in *Bimrose vs. Matthews,* 78 Wash. 38 *supra,* that the discharge of the husband in bankruptcy also discharged the wife from community obligations.

It follows that the proof of a claim in bankruptcy is tantamount to the recovery of a judgment and necessarily carries all the presumptions which attach to an ordinary judgment in the state courts. It would certainly be a peculiar and anomalous situation to have one set of presumptions pertaining to the Federal and another in the State courts —especially in view of the *Bimrose* case and *Thygesen vs. Neufelder,* 9 Wash. 455, supra—the latter holding that all the presumptions pointed out, attached to insolvency proceedings in the State court and that all community property passes to the assignee. It would certainly be a most inequitable doctrine that would sustain a discharge of a wife

from community obligations and not require the application of community assets to the payment of claims of honest creditors.

In the court below counsel laid considerable stress upon *Porter vs. Lazear,* 109 U. S. 84. The effect of that decision and counsel's argument thereupon is well answered by what Judge Neterer said in the closing paragraph of his opinion:

> "*Porter vs. Lazear,* 109 U. S. 84, cited by counsel for the wife, I think, is readily distinguished, in this, that by the provisions of the Act which creates the community estate, it is provided that the community real property shall be subjected to the payment of community debts and to sale on execution issued upon judgments obtained. The community right of the wife being a creature of the statute, is by the same statute, subjected to the community obligations; and while the Supreme Court of Pennsylvania held that the dower right of the wife could be sold under execution, there is no provision of the statute of Pennsylvania subjecting the dower interest of the wife to any indebtedness; nor is there a provision in the Bankruptcy laws of 1867, 14 Stat. at Large, page 517, under which that decision was rendered, vesting the trustee with the rights, remedies and powers of a judgment creditor holding an unsatisfied execution, and rights as contained in the provision of the act of June, 1910, *supra.*"

For the foregoing reasons we respectfully sub-

mit that the judgment of the District Court should be affirmed.

Respectfully submitted,

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